16

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Supreme Court of the United States

October Term 1952

No. 381

AMERICAN PRESIDENT LINES, LIMITED,
Petitioner

vs.

IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, UNITED STATES OF AMERICA, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PRESIDENT LINES, LIMITED

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Attorneys for Petitioner

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TOPICAL INDEX

	PAGE
Statement of Jurisdiction	1
Question Presented	2
Statement of Facts	2
Reasons for Allowance of the Writ	3

Cases Cited

City of Dallas Texas v. Rentzel, 172 F. 2d 122	3
United States v. Carusi, 166 F. 2d 457	3
Blackmar v. Guerre, 96 L. ed. adv. 315	4

Statutes Cited

28 U.S.C. § 1254 (1)	1
8 U.S.C.A. § 173	2
8 U.S.C.A. § 216	2
5 U.S.C.A. § 1009	3, 4, 5

Authorities Cited

Senate Report No. 752, 79th Cong. 1st Session, p. 43	4
Fed. Admin. Procedure Act and the Admin. Agencies p. 300	4

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, American President Lines, (Ltd.), a Delaware corporation, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit rendered July 9, 1952.

STATEMENT OF JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1); 62 Stat. 928.

QUESTION PRESENTED

Has the United States Court of Appeals for the District of Columbia Circuit jurisdiction to hear and decide a petition for review of a final agency action of the United States Immigration and Naturalization Service?

STATEMENT OF FACTS

The United States Immigration and Naturalization Service promulgated certain Rules on May 14, 1952 (Trans. fol. 2-7, incl. p. 1-6). In the Rules the term "alien" is defined (Trans. fol. 3 and 4, p. 3). The definition in the Rules is in irreconcilable conflict with the definition in the Statute (§ 1, First Quota Act of 1917; 39 Stat. 874; 8 U.S.C.A. 173). The statutory definition of "alien" excludes "citizens and nationals of the United States". The Rules definition includes "all citizens and nationals" who seek admission into the United States on the ground that they are citizens or nationals. The Rules also impose detention expenses on aliens who have visas issued by a consular agent within 60 days of their foreign departure. The statute expressly forbids the assessment and collection of detention expenses in such circumstances (§ 3, Act of 1944; 58 Stat. 817; 8 U.S.C.A. 216).

Petition for review was filed by American President Lines, Ltd., a person legally wronged, adversely affected, and a party aggrieved (Trans. fol. 1-12, incl., pp. 1-10). The petition was filed in the United States Court of Appeals for the District of Columbia. A motion to dismiss was filed, argued and granted. The ground for dismissal was that the Court had no jurisdiction over the case (Trans. fol. 21-22, p. 17).

REASONS FOR ALLOWANCE OF THE WRIT

1. This case presents an important question of statutory construction which has never been decided by the Supreme Court of the United States, to-wit, a final judicial determination of the meaning of the Administrative Procedure Act, particularly Section 10 of the Administrative Procedure Act (5 U.S.C.A. 1009; 60 Stat. 243, § 10). The learned United States Court of Appeals for the District of Columbia, in conjunction with rulings in other circuits, has construed the words "any applicable form of legal action . . . in any court of competent jurisdiction" to mean "an original action in the United States District Court for the District of Columbia". This construction violates the Administrative Procedure Act (*supra*) and nullifies its broad, remedial purpose.

2. The decision sought to be reviewed is irreconcilable with settled law as pronounced by the Supreme Court of the United States and in the various circuits in that it strictly construes a remedial statute and alters the plain wording thereof under the guise of construing it. This conflict should be eliminated by a decision of the Supreme Court of the United States.

3. The interpretations of the statute are in conflict in the United States Circuit Courts and a decision of the Supreme Court of the United States is necessary to resolve the conflict.

The Fifth Circuit has held that Sec. 10 of the Administrative Procedure Act (*supra*) does not deal with appellate court review but with review by an original action in a court of competent jurisdiction. *City of Dallas Texas* v. *Rentzel*, 172 F. 2nd 122.

The Third Circuit has held that a petition to Review, which is an appellate procedure and not an original action, is an appropriate form of relief. *United States* v. *Carusi*, 166 F. 2nd 457.

The Fifth Circuit has held that the fact that the United States Court of Appeals was not specifically named in the Administrative Procedure Act (*supra*) deprives that court of jurisdiction to act in review proceedings but permits the same silence to clothe the equally unnamed and statutory United States District Courts with complete jurisdiction.

4. It has been the contention of the Department of Justice and of a great many of the administrative agencies that the Administrative Procedure Act (supra) merely codified existing remedies and did not expand judicial review. *Sen. Rep. No. 752, 79th Cong. 1st Session* (1946) P. 43; *"The Federal Administrative Procedure Act and the Administrative Agencies"* P. 300 (Proceedings of an Institute conducted at New York University School of Law, Feb. 1-8, 1947. Edited by George Warren, New York University School of Law, 1947).

It is essential to the enjoyment by the citizens of the United States of the broad remedial provisions of the Administrative Procedure Act (*supra*) that this fallacy current in the courts and in the agencies throughout the United States be struck down by a decision of the Supreme Court of the United States and that the broad remedial provisions of the statute be finally confirmed by a decision of this Honorable Court.

5. The factual pattern of *Blackmar* v. *Guerre*, 96 L. ed. adv. 315 (decided March 3, 1952), justified this Honorable Court in assuming but not deciding that Commission action was reviewable under Section 10 of the Administrative Procedure Act *(supra)*. The doubt thus cast as to the right of review granted generally by the Act should be cleared by a decision of this Honorable Court in a case where the declaration will be opinion and not dictum.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the District of Columbia Circuit commanding that Court to certify and to send to this Court, on a day certain to be therein named, a full and complete transcript of the record and all proceedings had in this case, numbered and titled on its Docket No. 11455, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Court of Appeals for the District of Columbia Circuit may be reversed by this Court; and that your petitioner may have such other and further relief in the premises as may seem just and proper.

Respectfully submitted,

AMERICAN PRESIDENT LINES, LIMITED

MAYOCK AND MAYOCK

By Welburn Mayock

WELBURN MAYOCK

W. S. Mayock

W. S. MAYOCK

Attorneys for Petitioner

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	3
Conclusion	5

CITATIONS

Cases:

American Federation of Labor v. *National Labor Relations Board*, 308 U.S. 401	4
American President Lines v. *United States*, No. 50,399 (1951) now pending in the Court of Claims	3
Blackmar v. *Guerre*, 342 U.S. 512	4
City of Dallas, Texas v. *Rentzel*, 172 F. 2d 122, certiorari denied, 338 U.S. 858	4
United States v. *Agne*, 161 F. 2d 331	4
United States v. *Carusi*, 166 F. 2d 457	4

Statute:

Administrative Procedure Act, Sec. 10, 60 Stat. 2379 (5 U.S.C. 1009)	2, 4

Miscellaneous:

16 F. R. 12572	3
17 F. R. 95	3

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 381

AMERICAN PRESIDENT LINES, LIMITED, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court below (R. 17) is not yet reported.

JURISDICTION

The judgment of the court below was entered on July 9, 1952 (R. 17). The petition for a writ of certiorari was filed on September 6, 1952. The jurisdiction of the court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the validity of certain regulations promulgated by the Immigration and Naturalization Service is directly reviewable in a United States Court of Appeals.

STATUTE INVOLVED

Section 10 of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1009) provides in part as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.
>
> * * *

STATEMENT

Petitioner initiated this proceeding on June 9, 1952 by filing in the United States Court of Appeals for the District of Columbia a petition for judicial review of certain regulations, promulgated by the Immigration and Naturalization Service, Department of Justice (R. 1-10). The Court of Appeals dismissed the petition for want of jurisdiction (R. 17).

In December, 1951, the Immigration and Naturalization Service published in the Federal Register (16 F. R. 12572) proposed rules relating to the payment of detention expenses of passengers carried by shipping companies. Petitioner and others filed written protests to the proposed rules. After an oral hearing on these protests, the proposed rules and regulations were approved without substantial changes by the Acting Attorney General on May 7, 1952, and published in the Federal Register on May 14, 1952 (17 F.R. 4373-4374). It is the validity of these regulations which petitioner unsuccessfully sought to have reviewed in the court below.[1] (R. 7-8.)

ARGUMENT

Petitioner's sole contention (Pet. 3-4) is that Section 10 of the Administrative Procedure Act confers jurisdiction upon the courts of appeal to review the validity of the rules and regulations described in the Statement. The question is not

[1] Petitioner is challenging the validity of the same regulations in a case pending in the Court of Claims, *American President Lines* v. *United States*, No. 50,399 commenced October 2, 1951, and now on the calendar (R. 11).

whether review is available under Section 10, but merely whether a proceeding to review may in the first instance be brought in a Court of Appeals.

The court below was clearly correct in holding that it had no original jurisdiction in this cause. There is no statute conferring jurisdiction upon courts of appeal to review the administrative action here involved, and it is well established that the courts of appeals have no original jurisdiction except that specifically conferred by statute. See *American Federation of Labor* v. *National Labor Relations Board,* 308 U.S. 401; *United States* v. *Agne,* 161 F. 2d 331 (C.A. 3).

A petition to review an administrative determination is clearly an original suit which cannot be initiated in a Court of Appeals without specific statutory authorization. Section 10 of the Administrative Procedure Act does not confer upon courts of appeal original jurisdiction to review administrative action where Congress has not specifically done so in another statute. *City of Dallas, Texas* v. *Rentzel,* 172 F. 2d 122 (C.A. 5), certiorari denied, 338 U.S. 858. See also *Blackmar* v. *Guerre,* 342 U.S. 512, 516. The *City of Dallas* decision is not, as petitioner claims, in conflict with the decision in *United States* v. *Carusi,* 166 F. 2d 457 (C.A. 3) for in the *Carusi* case the action was originally brought in the district court and the appellate court was dealing with the question of whether the district court had jurisdiction to review the action under Section 10. That issue is not involved in this case in its present posture.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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18

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BRIEF FOR PETITIONER

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TOPICAL INDEX

	PAGE
Statement of Jurisdiction	1
Statement of the Case	1
Specification of error	2
Argument	2
Conclusion	7

Cases Cited

Blackmar v. Guerre 96 L ed 315	3
City of Dallas Texas v. Rentzel 172 F 2d 122	3, 6
Kristensen v. McGrath 179 F 2d 796	6
U. S. v. Carusi 166 F 2d 457	3

Statutes Cited

28 U.S.C. § 1254(i)	1
8 U.S.C.A. § 173	2
8 U.S.C.A. § 216	2
5 U.S.C.A. § 1009	2, 5, 6, 8
5 U.S.C.A. § 1032	3, 4
49 U.S.C.A. § 646	4
15 U.S.C.A. § 78Y	4
16 U.S.C.A. § 825*l*	4
15 U.S.C.A. § 717r	4
21 U.S.C.A. § 371(f)	4
29 U.S.C.A. § 210	4
49 U.S.C.A. § 17(9)	4
5 U.S.C.A. § 118K(c)	4

Authority Cited

92 Congressional Record 2200-1	6

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IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, UNITED STATES OF AMERICA, ET AL., *Respondents*

BRIEF FOR PETITIONER

To the Honorable, the Chief Justice and the Justices of the Supreme Court of the United States:

STATEMENT OF JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this court by 28 U.S.C. § 1254(1); 62 Stat. 928.

STATEMENT OF THE CASE

The United States Immigration and Naturalization Service promulgated certain Rules on May 14, 1952 (Trans. fol. 2-7, including p. 1-6). In the Rules the term "alien" is defined (Trans. fol. 3 and 4, p. 3). The definition in the Rules is in irreconcilable conflict with the

definition in the Statute (§ 1, First Quota Act of 1917; 39 Stat. 874; 8 U.S.C.A. 173). The statutory definition of "alien" excludes "citizens and nationals of the United States". The Rules definition includes "all citizens and nationals" who seek admission into the United States on the ground that they are citizens or nationals. The Rules also impose detention expenses on aliens who have visas issued by a consular agent within 60 days of their foreign departure. The statute expressly forbids the assessment and collection of detention expenses in such circumstances (§ 3, Act of 1944; 58 Stat. 817; 8 U.S.C.A. 216).

A petition for review was filed by American President Lines, Ltd., a person legally wronged, adversely affected, and a party aggrieved (Trans. fol. 1-12, incl. pp. 1-10). The petition was filed in the United States Court of Appeals for the District of Columbia. A motion to dismiss was filed, argued and granted. The ground for dismissal was that the Court had no jurisdiction over the case (Trans. fol. 21-22, p. 17).

SPECIFICATION OF ERROR

The learned United States Court of Appeals for the District of Columbia erred in holding that it had no jurisdiction to hear and decide a petition for review of the final agency action of the Immigration and Naturalization Service when the issue was solely one of law, and the proceeding was appellate in character.

ARGUMENT

The sole legal question involved is: What is the meaning of Section 10 of the Administrative Procedure Act? (Chapt. 324, Sec. 10, 60 Stat. 243; 5 U.S.C.A. § 1009)

By the terms of this section, a party aggrieved has a right to review of a final agency action by "any applicable form of legal action . . . in any court of competent jurisdiction".

if:

1) Judicial review is not precluded by statute.
2) The matter complained of has not been committed by law to agency discretion.
3) There is no special review proceeding specified by statute.

Our proceeding falls outside these three exceptions. Therefore only two questions remain:

1) Is our Petition for Review an applicable form of legal action?
2) Is the United States Court of Appeals for the District of Columbia a court of competent jurisdiction to hear and decide it?

The first question involves a conflict in the circuits. A petition for review is an appellate proceeding, wherein the same proceeding is continued in another tribunal. *Blackmar* v. *Guerre*, 96 L. Ed. 315. The Third Circuit has held a petition for review an applicable form of legal proceeding. *U. S.* v. *Carusi*, 166 F. 2d 457-62. The Fifth Circuit has held a petition for review was not an applicable form of legal proceeding and has held that the party aggrieved must proceed by original action in the United States District Court. *City of Dallas Texas* v. *Rentzel*, 172 F. 2d 122. The United States Court of Appeals for the District of Columbia has merely held that it has no jurisdiction in such a proceeding and given no reason or argument for its holding.

A petition for review is the normal method fixed by statute for review of final agency actions in most categories; such as in reviews from:

1) Federal Communications Commission—C 1189 §2, 64 Stat. 1129; 5 U.S.C.A. 1032

2) Secretary of Agriculture—C. 1189 §2, 64 Stat. 1129; 5 U.S.C.A. 1032
3) Maritime Administration—C. 1189 §2, 64 Stat. 1129; 5 U.S.C.A. 1032
4) Civil Aeronautics Board—C. 601 Title X §1006, 52 Stat. 1024; 49 U.S.C.A. §646
5) Security and Exchange Commission—C. 404 §25, 48 Stat. 901; 15 U.S.C.A. §78y
6) Federal Power Commission—C. 687, Title II, 49 Stat. 838; 16 U.S.C.A. §825*l*
7) Federal Security Agency—C. 556, 52 Stat. 821; 15 U.S.C.A. §717r; C. 675 §701, 52 Stat. 1055; 21 U.S.C.A. 371(f)
8) Department of Labor—Ch. 676, Sec. 102, 52 Stat. 1060; 29 U.S.C.A. §210

There are many others.

Actions for review in the District Court of the United States are also statutory proceedings, but exist in a much more limited category.

1) Interstate Commerce Commission—C. 722 Tit. I Sec. 12, 54 Stat. 913; 49 U.S.C.A. §17(9) Tit. 49 §646.
This provides for a collateral attack in the United States District Court and prescribes a "suit" to enjoin enforcement, not an appellate review proceeding.
2) Civil Service Commission, violations of Hatch Act—C. 640 §1-6, 54 Stat. 767; 5 U.S.C.A. §118K(c).
This provides for an appellate proceeding in review in the District Courts of the United States.

Petitioner respectfully submits that the words "any applicable form of legal action . . . in any court of competent jurisdiction" cannot legally be interpreted because there is nothing to interpret. The words are plain and unambiguous. They must merely be applied. They cannot in law or logic be held to mean "an original action in the United States District Court for the District of Columbia." This is what the decision complained of really means. This is where it sets petitioner herein.

The Administrative Procedure Act (supra) is a remedial statute and should be construed so as to correct the evils at which it was aimed. This statute which gave to a party a right of review in "any court of competent jurisdiction" conferred on "any court of competent jurisdiction" the necessary jurisdiction to hear and decide the proceeding.

The form of the proceeding fixes the forum in which it should be brought.

If an appellate proceeding for review is brought an appellate tribunal is a court of competent jurisdiction.

If an original suit is selected for relief a United States District Court is a court of competent jurisdiction.

The Administrative Procedure Act (supra) limits a party aggrieved as to a selection of remedies by prohibitive statutes which existed at the time it became effective. It is the duty of the agency to show that a statute prohibits review in the United States Court of Appeals. A party aggrieved does not have to search prior law for a statute conferring jurisdiction on that court.

Jurisdiction is conferred by the Administrative Procedure Act (supra) itself.

When the review, as in this case, involves only a question of law, and can be presented on a transcript consisting solely of the Rules and Regulations complained of, why should a person be forced to make a collateral attack by original action in a United States District Court, and then take an appeal to the United States Court of Appeals in order to bring the identical question of law into focus when in the vast majority of similar cases arising out of a similar agencies the relief is available by the mere filing of a petition for review in the appellate tribunal as we have done in this case?

Can such a round-about procedure be justified under a statute the purpose of which was, "inter alia, to enable

public duties and powers to be established without the cumbersome and technical prerequisites of mandamus, certiorari injunction, prohibition and habeas corpus"? *Kristensen* v.*McGrath*, 179 F. 2d 796-8.

Perhaps a bit of the Congressional debate might be informative. 92 Cong. Rec. 2200-1 (Mar. 13, 1946)

> Mr. Austin: In the event there is no statutory method now in effect for review of a decision of an agency, does the distinguished author of the bill contemplate that by the language he has chosen he has given the right to the injured party or the complaining party to a review by such extraordinary remedies as injunction, prohibition, *quo warranto* and so forth?
>
> "Mr. McCarran: My answer is in the affirmative. That is true.
>
> "Mr. Austin: And does he contemplate that even where there is no statute authority for certiorari a party might bring certiorari against one of these agencies?
>
> "Mr. McCarran: Unless the basic statute prohibits it."

The reasoning of the Fifth Circuit in the *City of Dallas* v. *Rentzel* case (*supra*) is to the effect that the Circuit Courts are statutory courts and that their jurisdiction must be specifically granted by statute. Yet the United States District Courts are also statutory courts and the same silence which the Fifth Circuit says deprives it of jurisdiction must deprive the United States District Court of jurisdiction as well. If implemented this fallacy would deny relief altogether and render the review provisions of the Administrative Procedure Act (supra) wholly illusory.

The words are "any court of competent jurisdiction". If the Circuit Courts are outside of that definition then they are *not* "any courts of competent jurisdiction". When all the parts of a category are designated a single part cannot evade inclusion by asserting that it was not

particularly referred to by name. The power of Congress to legislate generally should not be curtailed by such trivial and illogical legalism.

CONCLUSION

The curse of the Judicial Process has been the reluctance of courts to entertain jurisdiction in the newer categories of an expanding civilization if by any means, no matter how technical or legalistic, they can construe themselves out of accepting jurisdiction. The rapid rise of the Administrative Process and its massive encroachment on the Judicial Process is largely the result of this policy on the part of the Judiciary and the administrative policy which is completely the reverse. The officials of the Judicial Process strive to freeze their jurisdiction and curtail it to conventional historical forms. The officials of the Administrative Process strive to expand their jurisdiction by every possible means even into prohibited areas.

This case exemplifies the divergence in policies of the two procedures.

First, we have the Immigration and Naturalization Service which has been given power to administer in the fields of Immigration and Naturalization. Its statutory power is solely over "aliens". The statute gives them rule-making power. It seeks to expand its jurisdiction to include "citizens", as well as "aliens".

It can't find justification in the statute so it seeks to gain jurisdiction by spurious definition. It defines "alien" so as to include every "citizen" or "national" who could ever come before it at any port of entry in the United States, and then it proceeds to exercise jurisdiction over "citizens" on the grounds that it is only dealing with "aliens" as it has defined the term. The fact that the

statute creating its authority defines "alien" in a conflicting manner does not present a barrier to its greed for an expanding executive power.

Second, the regulation misdefining "alien" is challenged in the courts. The vice of the regulation is too patent to be argued. So legalism is sought by the Department of Justice to avoid a decision. The Court is asked to hold that it has no jurisdiction although the proceeding is appellate and the grant of jurisdiction is sweeping. To nullify the Administrative Procedure Act (supra) by restrictive interpretation is the objective. The Court sees an opportunity to avoid jurisdiction so by a per curiam decision which is terse and uninformative it announces that it has no jurisdiction and the party aggrieved stands thwarted —at least temporarily.

Thus the divergent policies of the Judicial Process and the Administrative Process join to thwart the legislative relief provided for in a broad remedial statute.

Like the harpies, of which Virgil writes, who stand behind the hungering spirits and snatch the food from their hands or foul it to a filthiness beyond all possible use our two great Governmental Processes have snatched the heart of the legislative grant from the hands of a party aggrieved or have sought to render it less usable by nullifying one of its ameliorating provisions.

The Supreme Court of the United States is the final hope of all parties aggrieved. In this proceeding the statute will be given life or death or condemned to a shriveled and impotent existence somewhere between.

Petitioner hopes the great Supreme Court of the United States will convey to its inferior tribunals through vigorous decision the scriptural message, "Do not weary of well doing" or gently chide them with the Miltonic phrase "Why move thy feet so slow to what is best".

To the Administrative Agency involved and to others, wide scattered, we hope the Supreme Court of the United States by decision on the merits will figuratively point to the provisions of the Administrative Procedure Act and to the law and decisions limiting rule making to the statutory grant and say, as it is written the Lord said to the sea on the day of creation—

> "Hitherto shalt thou come and no farther. Here shall thy proud waves be stayed."

Respectfully submitted,

AMERICAN PRESIDENT LINES, LIMITED

MAYOCK AND MAYOCK

Welburn Mayock

By WELBURN MAYOCK

W. S. Mayock

W. S. MAYOCK

Attorneys for Petitioner

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IMMIGRATION AND NATURALIZATION SERVICE, Department of Justice, United States of America, et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

AMERICAN PRESIDENT LINES, LIMITED
MAYOCK & MAYOCK

By WELBURN MAYOCK

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WILSON - EPES PRINTING CO. - RE 7-6003 - WASHINGTON 1, D. C.

INDEX

	PAGE
Respondent's First Point	2
Respondent's Second Point	6
Respondent's Third Point	8
Is An Unnecessary Trial To Be Enforced?	9
Conclusion	14

Citations

Cases:

Blackmar v. *Guerre*, 342 U. S. 512; 96 L. ed. 315, 316 6, 8
City of Dallas, Texas v. *Rentzel*, 172 F. 2d. 122 (C. C. A. 5) 8
Matter of Skinner & Eddy Corporation, 265 U. S. 86; 68 L. ed. 912 9
U. S. v. *Carusi*, 166 F. 2d. 457 8, 9
Wong Yang Sung v. *McGrath*, 339 U. S. 33; 94 L. ed. 616 14

Statutes:

Administrative Procedure Act, Ch. 324 §§ 1-12, 60 Stat. 237; 5 U. S. C. A. §§ 1001-1011 2, 3, 4, 5, 8, 11, 13
Hatch Political Activity Act, 53 Stat. 1147; 5 U. S. C. A. 118k (c) 6

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IMMIGRATION AND NATURALIZATION SERVICE, Department of Justice, United States of America, et al., *Respondents*

PETITION FOR REHEARING

To the Honorable, The Supreme Court of the United States of America:

Now comes petitioner and requests a rehearing of the order denying motion for a writ of certiorari in the above-entitled cause, and as grounds for rehearing says:

The original petition was denied while the reply brief was being printed. No claim is made as to any impropriety in this circumstance but the fact remains that the points in respondent's brief stood unanswered at the time the Supreme Court of the United States took action.

Petitioner fears it had not adequately expressed the real importance to the general public and to the Judicial

Process itself which lies hidden in this case, and proposes to amplify its showing in this petition for rehearing.

The Administrative Procedure Act is a remedial law of vast importance to everyone in the United States. Clear and timely clarifications of its meaning by the Supreme Court is essential if we are to give any consideration to the correction of the evils this legislation was designed to cure.

While it is true that a denial of a petition for certiorari is not an affirmance of the ruling below, it definitely affects administrative agencies and is used as an affirmance as far as they are concerned. It is this effect of the denial and not its technical legalistic significance which touches the flesh of the citizen. The citizen who is injured gets small consolation from the knowledge that his injury was not legalistically justified.

The three points made by Respondent in its brief are specious.

First Point:

The Administrative Procedure Act does not confer direct review jurisdiction on the U. S. Court of Appeals for the District of Columbia.

Second Point:

A review proceeding is an original suit.

Third Point:

There is no conflict in the Circuits.

Petitioner will reply seriatim.

RESPONDENT'S FIRST POINT

"Courts of Appeal have no original jurisdiction except that specifically conferred by statute."

We accept this general proposition, but respectfully contend that the Administrative Procedure Act (Ch. 324,

§§ 1-12, 60 Stat. 237; 5 U.S.C.A. §§ 1001-1011) does specifically confer that jurisdiction when it gives a party aggrieved by administrative action a right of review by "any applicable form of legal action" in "any court of competent jurisdiction." A petition for a review is an applicable form of legal action. An appellate court is a court of competent jurisdiction to hear and decide appellate proceedings and a review proceeding is a form of appellate procedure. It is doing it every day, in similar review proceedings from similar administrative agencies. A statute which confers a right to an action in any court of competent jurisdiction confers on any court of competent jurisdiction the jurisdiction to hear and decide the matter. Otherwise, the right of action is illusory.

Jurisdiction is granted specifically in many specific statutes referring to the subject matter with which the particular administrative agency is concerned.

The Administrative Procedure Act (supra) is a general remedial act designed to afford every party aggrieved a judicial review in *every* case where such a review is lacking. It can't do so without conferring jurisdiction on courts of competent jurisdiction to pass on such reviews. It has used appropriate words to confer such jurisdiction. In effect Congress said:

(1) If a review is prohibited by statute, we will not disturb that prohibition.

(2) If there is a specific statutory review procedure already provided, a party aggrieved must pursue that procedure, if it is adequate.

(3) If no review is provided for now, the party aggrieved may pursue *any applicable form of legal action* in *any court of competent jurisdiction.*

There is the *specific statutory grant of jurisdiction* to all courts of competent jurisdiction, including the U. S.

Court of Appeals for the District of Columbia. The words are general and all-inclusive. A court cannot reasonably avoid inclusion in that context by saying, "Congress didn't call us by name."

Congress didn't call any court by name. It conferred jurisdiction on *all* courts of competent jurisdiction. The U. S. Court of Appeals for the District of Columbia is a segment of the totality referred to in the Statute.

A review procedure in a court of law is a form of legal action. It is an *applicable form*, since it is the usual form of legal action instituted to secure review in the vast majority of similar cases involving judicial reviews of final agency action.

When one considers the purpose of the Administrative Procedure Act (supra), and reads its legislative history, it should be clear that the words used were all-inclusive and gave a party aggrieved, who lacked a remedy under prior law, his choice of remedies and his choice of courts. Only two restrictions are noted: (1) Review must not be prohibited by existing law. (2) The type of legal action chosen must be applicable to the relief sought.

Respondent would have us believe that Congress had in mind only the precise forms of legal action permitted in Common law, probably before the Statute of Westminster II, with its "consimili casu" clause, because if we implement the spirit of that medieval statute, we would have our relief in the U. S. Court of Appeals for the District of Columbia where the vast majority of "similar cases" involving judicial review are heard and decided today.

Respondent would also have us believe that by the use of the words *"any form of legal action"* Congress did not include appellate forms of legal action and that the broad term *"any court of competent jurisdiction"* means: "The U. S. District Court for the District of Columbia."

To so hold would not be an act of interpretation of plain, unambiguous words. It would be substantive legislation in the form of judicial action and would, in effect, repeal the general terms of the Statute.

The words: "court of competent jurisdiction" should not give us any trouble.

They merely mean a court that has jurisdiction over the parties and the subject matter and has the power to act. Whether or not the U. S. Court of Appeals for the District of Columbia is such a court is the issue in this proceeding.

Its power to act or its lack of power to act must be decided here. Respondent seems to contend that we must look *outside* the Administrative Procedure Act (supra) for statutory extension of its jurisdiction. It is suggested that we try the U. S. District Court. However, we can't assume jurisdiction in the U. S. District Court, if "name-calling" is essential. It also is a statutory court and wasn't named in the Administrative Procedure Act (supra) either. The same argument which disqualifies the U. S. Court of Appeals disqualifies the U. S. District Court. Petitioner contends that the Administrative Procedure Act (supra), *itself* grants the authority by the necessary connotation of the words it uses.

To repeat: A law which confers a right of legal action to a party aggrieved in any court of competent jurisdiction must confer on every court of competent jurisdiction the jurisdiction to hear and decide that legal action.

All the party aggrieved must do is select one of several forms of action available. If he selects an original action, then the court of competent jurisdiction is a court of original jurisdiction.

If he selects an appellate form of legal action, then an appellate court is a court of competent jurisdiction.

The subject matter of the Section involved is Judicial Review, an appellate procedure. It is pure innovation to hold that Congress was referring only to original actions.

RESPONDENT'S SECOND POINT

Respondent's second point is that a review proceeding is an original action.

Singularly enough, Respondent quotes as authority *Blackmar* v. *Guerre*, 342 U.S. 512; 96 L. ed. 315, 316, where the Supreme Court of the United States holds the direct opposite. Either the writer of Respondent's brief didn't read that case, or cynically assumed that the Justices of the Supreme Court of the United States would not do so, because one could scarcely conceive of a case in greater conflict with the assertion it is pretended to support.

The case involved the right to the review of an agency action granted in the Hatch Act. (53 Stat. 1147; 5 U.S. C.A. 118 k (c))

An original action was brought, not a review proceeding. The Supreme Court held that the statute provided for a review proceeding, not an original action, and proceeded to point out the distinction between the two forms of legal action, stating that the statute provided for a *review*, not a "new proceeding," and that a review was "the continuation of the same proceeding before another tribunal."

The construction sought by the Respondent is as narrow as a profile. It requires the insertion of the word "original" in a statute in which the word doesn't appear. It constitutes an arrogant bid to continue as far as possible the evils which shocked the Congress into granting citizens general relief where relief was then lacking.

The Court of Appeals for the District of Columbia has fallen in line in the attempt to whittle away the relief granted by Congress to citizens in this remedial statute.

To hold that the words *"any* applicable form of legal action" means "a particular form of legal action," or that the words "any court of competent jurisdiction" means "the U. S. District Court for the District of Columbia" is not the result of ignorance or stupidity, and Petitioner charges the learned court with neither. It involves deliberate and willful distortion of words and a resulting change in the law. This is not the "interstitial growth" which the late Justice Holmes referred to in explanation of "judicial legislation," nor is it "filling the gaps" in the law, as the late Justice Cardozo characterized the same function. This is broad substantive legislation, designed to narrow the broad provisions of a remedial statute, and to deprive citizens of recourse to speedy judicial remedies when their rights have been invaded.

Mr. Justice Jackson defined a Soviet Court as "an arm of executive power." This has never been the glory of an American court. But when courts blindly follow the executive line, and when the fruits of the judicial process begin to fall into a foreign pattern, it is time for a vigorous and patriotic protest. It was the executive branch of the government which urged this construction upon the Fifth Circuit and upon the U. S. Court of Appeals for the District of Columbia. When our courts resort to distortion at the behest of administrative agencies and in aid of administrative aggression, the time for niceties in terms of remonstrance has passed. Courts can defy the Constitution just as effectively as the Congress. The Courts control Congressional usurpation of power, but there is no legal institution in our government to control the Courts, when the highest Court has spoken. There is, however, a power of resistance reserved to the people

by the Constitution, and it is as one of the people, an infinitesimal segment of the sovereign, that this protesting voice is now raised.

RESPONDENT'S THIRD POINT

Petitioner contends there is a conflict between the ruling in the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Third Circuit. Respondent disagrees.

The Fifth Circuit held that Section 10 of the Administrative Procedure Act (supra) did not deal with appellate procedures but dealt only with original actions. *City of Dallas, Texas* v. *Rentzel,* 172 F. 2d. 122; (C.C.A. 5), certiorari denied, 338 U. S. 858.

The Supreme Court has held that a review proceeding was not an original action, but was the continuation of the same proceeding before another tribunal, an appellate procedure. *Blackmar* v. *Guerre,* 342 U. S. 512; 96 L. ed. 315, 316.

The Third Circuit entertained a Petition for Review under the provisions of Section 10 of the Administrative Procedure Act (supra) and held it to be an *appropriate form of relief. United States* v. *Carusi,* 166 F. 2d. 457.

Thus we have the U. S. Supreme Court holding that a Review is an appellate procedure;

The Fifth Circuit holding that appellate procedures are not available;

The Third Circuit holding that appellate procedures are available.

No more direct conflict can be imagined.

Respondent construes the *Carusi* case (supra) as non-conflicting by stating it was an action brought in the

District Court. But this is a specious argument. There is no conflict, it is true, as to the forum.

The conflict is in the availability of the Form of Action. i.e. whether an appellate or an original form of procedure was available. The two Circuits are in direct conflict in this regard.

In the *Carusi* case (supra), the question as to whether the Review Proceeding would have been available by direct petition to the U. S. Court of Appeals for the Third Circuit was not raised.

IS AN UNNECESSARY TRIAL TO BE ENFORCED

The Supreme Court of the United States has in the past been interested in saving litigants from the useless waste of time and effort which would be expended in an unnecessary trial. *The Matter of Skinner & Eddy Corporation*, 265 U. S. 86; 68 L. ed. 912, is a case in point. In that case, the Court of Claims vacated a previously granted order of dismissal which had been entered at the request of the plaintiff. Normally, this would have brought the matter to a trial and after trial, on appeal, the question of the error of the Court of Claims in vacating its order of dismissal could have been reviewed and corrected in the Supreme Court.

The plaintiff brought a mandamus proceeding in the Supreme Court. Normally, mandamus will not lie if an appeal is possible. The Supreme Court noted that the pure question of law as to whether or not the right of a plaintiff to a dismissal was absolute could be decided in the mandamus proceeding and did so decide it, stating: "It would be a useless waste of time and effort to enforce a trial in the court of claims if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated."

On principle, the same matter is involved in these proceedings. The question is purely one of law. Why should we be forced to the "useless waste of time and effort" in order to bring the same legal issue to the same appellate tribunal which had the matter before it originally.

The heart of the question is merely this.

The Law: Defines "alien" so as to *exclude* U. S. citizens and nationals.

The Rule Complained of: Defines "alien" so as to *include U. S.* citizens and nationals.

Are these definitions harmonious or conflicting?

Does a definition which excludes citizens conflict with a definition which includes them?

That is the pure question of law to be decided. Should the U. S. Court of Appeals decide the question or should it dodge jurisdiction by construing the word *"original* action" into a statute which doesn't use the term at all, like the Fifth Circuit did, and thus impose upon a party aggrieved "the useless waste of time and effort to enforce a trial" in an original action.

In this case, all the facts necessary for a decision of the matter on its merits was before the U. S. Court of Appeals.

The Petition set forth the procedure and the Rules complained of. No procedural deficiency was alleged. The rule was alleged to be in conflict with the law. The rules were set forth in toto. There remained merely the judicial function of deciding a question of law. If the rule was in harmony with the Statute, the court could so find and validate the rule. If the rule was in conflict with the Statute, the court could so find and nullify it.

Where under these circumstances is the use of a trial in an original action? There are no facts to find. Expense, effort and delay are the inevitable result. Were these the ends sought by Congress when it enacted the Administrative Procedure Act (supra)? If not, why distort the Statute to produce such results. Why not interpret it so as to give effect to the remedy Congress enacted to correct the whilom vices in the law.

Was the statute designed to make Review easier or more cumbersome?

Was it the design of Congress to make Review more expensive by interposing a trial when no issue of fact existed?

Was Congress interested in withholding judicial relief or in granting it?

Was Congress trying to make it difficult on the citizen by putting unnecessary obstacles in his way, or was Congress interested in speeding up review processes and giving the citizen new relief which had theretofore been unavailable?

The words of the Statute are plain. The party aggrieved in the case of the absence or inadequacy of present remedies in existing law can choose his remedy and choose the court to fit the pattern of his remedy.

That is the only meaning which can be given the plain words: "any applicable form of legal action" in "any court of competent jurisdiction."

The Fifth Circuit read into those words a plain innovation. Its construction amended the statute by adding a term which was not enacted. It said the words "any applicable form of legal action" dealt "not with appellate review but with review by an original action in a court of competent jurisdiction."

Yet the very words "review" connote appellate procedure, not original action. It is the statutory review pro-

ceedings which constitute the mainstream of litigation involving relief from erroneous administrative action. Where in the Statute or in the evils it was enacted to correct can we find justification for a construction which dams up the mainstream of relief given citizens in similar statutes involving similar agency actions, and imposes a lesser and more circuitous method for judicial review of agency action where no relief was possible in prior law? The Statute was designed to give judicial review to those who lacked it. It didn't propose to give the present victims partial, diluted, and more cumbersome relief.

The climate of the legislation and the wording of the act are directly opposed to such construction. The heart of the Statute on the subject of judicial review is like that of criminal law. What is not prohibited is permitted. A party aggrieved in an agency action must first see if judicial review is prohibited. If not, he must next see if the method of review is provided for by pre-existing law, and is adequate. If so, he must pursue that method. If not, the world is his. He may select any kind of applicable legal action in any court of competent jurisdiction.

When the Statute specifically gave examples such as declaratory relief and various writs of mandatory and prohibitory injunction, it was not limiting the universality of its language. On the contrary, it was pointing out that under the term "any form of legal action" it was including collateral attack to review proceedings so as to give a choice and make the whole body of adjective law available. Adequacy of remedy was the obvious goal of the Statute. The words used gave scope to the subject of relief and did not restrict it. There is no hint of an intent to return to the formal writ system of the old Common Law.

It is apparent from the words used that Congress intended both original actions and review proceedings.

It headed the section by the words "Judicial Review." One of the most controversial sections involved the question of how far the court was bound by administrative findings. The reading of "the whole record" and the abrogation of the "scintilla rule" which are of the essence of the enactment are inapplicable provisions if only original actions were in contemplation. These terms are only applicable to "appellate procedure."

Where in the language used are we justified in holding that the Statute sought less relief, in judicial review proceedings as to matters where judicial review was not available under existing law, than was given in cases where judicial review was already permitted under existing law?

The words of the Statute connote the exact opposite. Reviews in existing procedures were continued unchanged and were to be followed, if adequate. Agency action for which no judicial review was provided in existing law and where review was not prohibited was given the all-inclusive choice of "any applicable form of legal action in any court of competent jurisdiction." This was a larger grant than was presently available in any review proceeding. Direct attack, collateral attack, original and appellate writs and appellate review procedures known to the law in similar cases now became available. The party aggrieved could pick and choose. There were only two restrictions. His choice of remedy must be applicable to the relief he sought. His choice of court must be one of competent jurisdiction to hear and decide the type of legal action he chose to present.

Petitioner most respectfully urges the Supreme Court of the United States to construe the Administrative Procedure Act (supra) in accordance with its own pronounce-

ments as to how that Act should be construed. Relevant statements are to be found in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33; 94 L. ed. 616:

> "But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it aimed at appear."
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> • • • •
>
> "Such were the evils found by disinterested and competent students. Such were the facts before Congress which gave impetus to the demand for the reform which this Act was intended to accomplish. It is the plain duty of the courts, regardless of their views of the wisdom or policy of the Act, to construe this remedial legislation to eliminate so far as its text permits the practices it condemns."

With interpretation under such liberal standards and with so positive a recognition by the Supreme Court of the United States of its obligation under the Administrative Procedure Act (supra), Petitioner respectfully asks that the construction sought in these proceedings be declared to be the law of the land. Appropriate relief will then inevitably follow.

CONCLUSION

Because: There is great public necessity for full clarification of the provisions of the Administrative Procedure Act relating to Judicial Review;

Because: Present interpretations in the Circuits are so narrow as to nullify the broad provisions of that remedial legislation;

Because: There is conflict in the Circuits as to whether review procedure and not mere collateral attack is available in cases where no review was possible under prior law;

This case presents all the elements necessary to justify the issuance of a writ of certiorari.

It is respectfully submitted that a rehearing be granted and that the writ issue.

AMERICAN PRESIDENT LINES, LIMITED
Petitioner

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Welburn Mayock

By WELBURN MAYOCK

W. S. Mayock

W. S. MAYOCK

Attorneys for Petitioner

DISTRICT OF COLUMBIA, SS:

W. S. MAYOCK, being first duly sworn, on oath certifies and says:

That he is one of the attorneys for petitioner in this cause; that he makes this certificate in compliance with Rule 33 of the rules of this court; that the foregoing petition for rehearing is presented in good faith and not for delay; that the foregoing petition for rehearing contains new matter not previously presented and in his judgment is well founded.

W. S. Mayock

Subscribed and sworn to before me at Washington, District of Columbia, this 18th day of December, 1952.

(SEAL)

/s/ Raymond Goldberg

Notary Public in and for the
District of Columbia